Tanjung Rhu Land Sdn Bhd v Mamlaka Langkawi Sdn Bhd (previously known as MAS Hotels & Boutique Sdn Bhd)

HIGH COURT (ALOR STAR) — ORIGINATING SUMMONS NO 24–1668 OF 2009(MT3)
ZAMANI A RAHIM JC
10 JANUARY 2010

Land Law — Restraint on dealings — Caveat — Extension of validity of private caveat, application for — Whether plaintiff had caveatable interest — Whether evidence produced in support disclosed serious question to be tried — Whether balance of convenience lay in favour of caveat remaining on register pending disposal of suit — National Land Code ss 323, 326, 327, 340(1), (2) & (3)

Pursuant to a sale and purchase agreement ('the SPA') dated 16 June 1997, the defendant acquired four lots of land ('the lands') from Pakatan Permai Sdn Bhd ('PPSB'). The lands had been subdivided from lots which had been previously amalgamated. Although PPSB had received the titles to the land from the plaintiff, the original proprietor, the defendant became the registered proprietor of the lands from 2002 and was in full occupation of the lands with the consent and full knowledge of the plaintiff. The defendant had in fact invested more than RM200m to construct a six-star holiday resort on the lands which had been operational since April 2005. As one portion of that amalgamated land was still pending subdivision, the defendant commenced legal action against the plaintiff seeking, inter alia, specific performance of the SPA in relation to the remaining unperformed obligation. On or around 16 October 2008, the plaintiff lodged a private caveat on the lands claiming that the land had been unlawfully transferred to the defendant. It was the plaintiff's case that the registration of title of the lands to the defendant was unlawful because of alleged non-fulfilment of conditions precedent in the two SPAs that were executed before the lands changed hands. As such, the plaintiff had decided to counterclaim against the defendant and PPSB in the legal suit whereby it sought the re-transfer of the lands back to itself. The plaintiff submitted that these circumstances provided it with a caveatable interest in the lands. The plaintiff further submitted that the fact that the defendant had not applied to strike out the counterclaim in the High Court proved that there were serious issues to be tried in the counterclaim. When the defendant discovered the plaintiff's private caveat, it applied to remove it pursuant to s 326 of the National Land Code ('the NLC'). The defendant submitted that the plaintiff had failed to establish the threshold requirement of a caveatable interest in this case and that there was thus no necessity to consider the two subsequent tests for the removal of a caveat. This was the plaintiff's application via originating summons ('OS') for an extension of the

validity of the private caveat lodged by it. In determining whether the plaintiff's caveat should remain on the register of document of title or be removed the court had to apply the three-stage test as to whether the plaintiff had disclosed a caveatable interest under s 323(1) of the NLC; if so, whether the evidence produced in support of this claim disclosed a serious question to be tried; and finally if both questions are resolved in the caveator's favour whether the balance of convenience lies in favour of the caveat remaining on the register pending the disposal of the suit.

Held, dismissing the plaintiff's originating summons:

(1) The test to be fulfilled by a caveator applying for an extension of his caveat under s 326 of the NLC was identical to that in an application for a removal of a caveat under s 327 of the NLC. Under s 340(1) of the NLC, the registered proprietor of any land obtains an indefeasible title in the land and this title shall only be defeasible in the specific circumstances provided in s 340(2) of the NLC. Since the transfer of the lands in the present case were effected using valid registrable instruments duly executed by the plaintiff and the lands were unconditionally transferred to the defendant in good faith for valuable consideration without allegation of any fraud or misrepresentation ss 340(2) and (3) of the NLC do not apply. Even if the rights to the title of PPSB were defeasible, this had no relevance to the defendant who was a subsequent bona fide purchaser for value. The defendant had indefeasible title and there was no evidence to defeat its registered title under s 340(2) of the NLC. As such the plaintiff had failed to establish a caveatable interest in the lands to justify the lodgment of the caveat. Following the doctrine of stare decisis, the plaintiff was not a body which can ever successfully claim title to, or any registrable interest in the lands from the defendant justifying the entry of a caveat (see paras 11, 26–28 & 30–32).

(2) The plaintiff's rights, if any, would only amount to a contractual right against PPSB based on the first SPA to which the defendant was not a party. Thus the plaintiff had no privity of contract with the defendant and there was no lawful basis under which the good titles obtained by the defendant from PPSB could be rendered defeasible. As such, there was no issue to be tried and there was no necessity for the court to consider the matter further (see paras 35 & 37).

(3) The existence of the caveat over the lands was prejudicial to the defendant as the caveat affected the value of the lands and diminished investor confidence in the defendant. This prejudice to the defendant was further compounded by the fact that the plaintiff had acted with inordinate delay in prosecuting its alleged rights. Moreover, the caveat also included legal implications such as the inability to charge,

subdivide or amalgamate the lands. Such prejudice to the defendant should tilt the balance of convenience against the extension of the caveat (see paras 39, 40 & 42).

[Bahasa Malaysia summary

Berikutan perjanjian jual beli ('PJB') bertarikh 16 Jun 1997, defendan memperoleh empat lot tanah (tanah tersebut') daripada Pakatan Permai Sdn Bhd ('PPSB'). Tanah tersebut dibahagikan daripada lot-lot yang sebelum ini digabungkan. Walaupun PPSB telah menerima hak milik tanah untuk tanah tersebut daripada plaintif, pemilik asal, defendan menjadi pemilik berdaftar tanah tersebut dari 2002 dan menduduki sepenuhnya tanah tersebut dengan persetujuan dan pengetahuan penuh mengenai plaintif. Defendan telah sebenarnya melabur lebih daripada RM200 juta untuk membina resort percutian enam bintang di atas tanah tersebut yang telah beroperasi sejak April 2005. Oleh kerana salah satu bahagian tanah yang bergabung tersebut masih menunggu pembahagian, defendan memulakan tindakan undang-undang terhadap plaintif memohon, antara lain, pelaksanaan spesifik PJB tersebut berkaitan dengan kewajipan yang masih tidak dilaksanakan. Pada atau sekitar 16 Oktober 2008, plaintif memasukkan kaveat persendirian atas tanah tersebut mendakwa bahawa tanah tersebut telah secara salah dipindah milik kepada defendan. Adalah kes plaintif bahawa pendaftaran hak milik tanah tersebut kepada defendan adalah salah di sisi undang-undang kerana tidak memenuhi syarat awalan yang dikatakan di dalam dua PJB yang ditandatangani sebelum tanah tersebut bertukar tangan. Oleh itu, plaintif telah memutuskan untuk menuntut balas terhadap defendan dan PPSB di dalam guaman undang-undang di mana ia menuntut pindah milikan semula tanah kepadanya. Plaintif menghujah bahawa dalam keadaan ini ia memberi kepadanya kepentingan yang boleh dikaveat atas tanah tersebut. Plaintif selanjutnya menghujah bahawa fakta bahawa defendan tidak memohon untuk membatalkan tuntutan balas di Mahkamah Tinggi membuktikan bahawa terdapat isu-isu yang serius untuk dibicarakan di dalam tuntutan balas tersebut. Apabila defendan mengetahui mengenai kaveat persendirian plaintif, ia memohon untuk membatalkannya menurut s 326 Kanun Tanah Negara ('KTN'). Defendan menghujah bahawa plaintif telah gagal untuk membuktikan permintaan bahagian kepentingan yang boleh dikaveat di dalam kes ini dan bahawa oleh itu tidak perlu untuk mempertimbangkan dua ujian yang kemudian untuk pembatalan kaveat. Ini adalah permohonan plaintif melalui saman pemula ('SP') untuk lanjutan kesahan kaveat persendirian yang dimasukinya. Dalam memutuskan sama ada kaveat plaintif harus tetap dalam daftar hak milik atau dikeluarkan, mahkamah perlu mengguna pakai ujian tiga peringkat sama ada plaintif telah mendedahkan kepentingan yang boleh dikaveat di bawah s 323(1) KTN, jika ya, sama ada keterangan yang dikemukakan untuk menyokong tuntutan ini mendedahkan persoalan serius yang perlu dibicarakan; dan akhir sekali jika kedua-dua persoalan diputuskan memihak kepada pengkaveat sama ada imbangan

kesenangan memihak kepada kaveat kekal atas daftar sementara menunggu pemutusan guaman tersebut.

Diputuskan, menolak saman pemula plaintif:

(1) Ujian yang perlu dipenuhi oleh pengkaveat yang memohon lanjutan kaveat di bawah s 326 KTN adalah sama dengan permohonan untuk pembatalan kaveat di bawah s 327 KTN. Di bawah s 340 KTN, pemilik berdaftar apa-apa tanah yang memperoleh hak milik tidak boleh sangkal di dalam tanah hanya boleh disangkal di dalam keadaan spesifik yang diperuntukkan di dalam s 340(2) KTN. Oleh kerana pindah milik tanah di dalam kes ini dilakukan menggunakan instrumen sah yang boleh didaftar yang telah ditandatangani oleh plaintif dan tanah tersebut telah dipindah milik tanpa syarat kepada defendan dengan niat baik bagi balasan bernilai tanpa dakwaan apa-apa fraud atau salah representasi ss 340(2) dan (3) KTN tidak beraplikasi. Walaupun hak-hak terhadap hak milik PPSB adalah boleh disangkal, ini tidak ada kerelevanan kepada defendan yang merupakan pembeli bona fide untuk nilai. Defendan mempunyai hak milik tidak boleh sangkal dan tidak ada keterangan untuk menyangkal hak milik berdaftarnya di bawah s 340(2) KTN. Oleh itu plaintif telah gagal untuk membuktikan kepentingan boleh dikaveat di dalam tanah untuk menjustifikasi kemasukan kaveat. Berikutan doktrin stare decisis, plaintif bukan suatu pertubuhan yang boleh dengan jayanya menuntut hak milik terhadap, atau apa-apa kepentingan yang boleh didaftar di dalam tanah daripada defendan dengan menjustifikasi kemasukan kaveat (lihat perenggan 11, 26–28 & 30–32).

(2) Hak plaintif, jika ada, hanya merupakan hak kontrak terhadap PPSB berdasarkan atas PJB yang pertama kepada mana defendan bukan pihak. Oleh itu, plaintif tidak mempunyai priviti kontrak dengan defendan dan tidak ada asas yang sah di bawah mana hak milik yang sah diperoleh oleh defendan daripada PPSB boleh dijadikan boleh disangkal. Oleh yang demikian, tidak ada isu untuk dibicarakan dan tidak ada keperluan untuk mahkamah mempertimbangkan perkara tersebut selanjutnya (lihat perenggan 35 & 37).

(3) Kewujudan kaveat atas tanah tersebut memprejudis defendan kerana kaveat tersebut menjejaskan nilai tanah dan mengurangkan keyakinan pelabur atas defendan. Prejudis kepada defendan ini selanjutnya diburukkan lagi oleh fakta bahawa plaintif bertindak dengan lewat yang melampau dalam mendakwa hak-haknya yang didakwanya. Tambahan, kaveat tersebut juga termasuk implikasi undang-undang seperti ketidakbolehan gadaian, pembahagian atau penggabungan tanah

tersebut. Prejudis sedemikian kepada defendan sewajarnya memihak kepada imbangan kesenangan untuk pelanjutan kaveat (lihat perenggan 39, 40 & 42).]

Notes

For cases on caveat, see 8(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3611–3981.

Cases referred to

Adorna Properties Sdn Bhd v Boonson Boonyanit [2001] 1 MLJ 241, FC (folld)
DCB Finance Berhad v Hii Yiik Ting [1996] MLJU 591; [1996] 1 LNS 12, HC (refd)
Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263; [1992] 1 CLJ 50, SC (distd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)
Megapillars Sdn Bhd v Loke Kwok Four [1996] 3 MLJ 71; [1996] 4 CLJ 82, HC (refd)
Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782, CA (refd)
Rakyat Corp Sdn Bhd v Abd Naeeim bin Tarmiji [2008] 4 MLJ 111, HC (refd)
Urethane Systems Sdn Bhd v Quek Yak Kang [2006] 6 CLJ 81, HC (refd)
Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113; [1984] 1 CLJ 441 (Rep), FC (refd)
Yuny-Li Home Care Sdn Bhd v Fairview Development Sdn Bhd [2009] 9 MLJ 189; [2009] 1 LNS 543, HC (refd)

Legislation referred to

National Land Code ss 323, 323(1), 326, 327, 329, 340(1), (2), (3), Form 19C

Tan Keng Teck (Lim Kian Leong & Co) for the plaintiff.
Elaine Yap (Wong & Partners) for the defendant.

Zamani A Rahim JC:

INTRODUCTION

[1] The originating summons dated 2 September 2009 filed by the plaintiffs for an extension of the validity of a private caveat vide presentation No 7836/2008 lodged by the plaintiffs.

[2] The plaintiffs was formerly known as Promet (Langkawi) Resorts Sdn Bhd ('Promet') while the defendants was formerly known as MAS Hotels & Boutique Sdn Bhd ('MHB'). It is convenient to refer to the parties hereafter

A by these abbreviations, as adopted in the affidavits filed.

BACKGROUND FACTS

B **[3]** The defendants (MHB) is the registered proprietor of the lands held under document of titles No HS(D) 1, Lot No 756; HS(D) 2, Lot No 757; HS(D) 624, Lot No 905 and HS(D) 625, Lot No 906 ('the lands').

C **[4]** The lands were duly registered in the name of the defendants (MHB) having received transfers of the same from Pakatan Permai Sdn Bhd ('PPSB') back in 2002 and 2005, details of which are as follows:

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Title	Date of Registration
1) HS(D) 1, Lot No 756	6 October 2002
2) HS(D) 2, Lot No 757	6 October 2002
3) HS(D) 624, Lot No 905	15 August 2005
4) HS(D) 625, Lot No 906	15 August 2005

E **[5]** It is undisputed that the defendants (MHB) has had uninterrupted enjoyment of good title to the lands since the aforesaid dates of registration, and has in fact been in occupation of the lands with the full knowledge and consent of the plaintiffs (Promet) since 1997.

F **[6]** The lands were acquired by the defendants (MHB) from PPSB pursuant to a sale and purchase agreement dated 16 June 1997 ('SPA') between the defendants (MHB) and PPSB and had been subdivided from lots which had been previously amalgamated. PPSB had received titles from the plaintiffs (Promet), the original proprietor.

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[7] One portion of that amalgamated land, that is, HS(D) 623 Mukim Ayer Hangat is still pending subdivision. Thus, on 30 June 2006, the defendants (MHB) commenced legal action against the plaintiffs (Promet) and PPSB in Kuala Lumpur High Court Suit No S3–22–634 of 2006 ('KL suit') seeking, inter alia, specific performance of the SPA in relation to the remaining unperformed obligation to subdivide and transfer of HS(D) 623 Mukim Ayer Hangat to the defendants (MHB).

H

I **[8]** Notwithstanding the date of the transfers of the lands to the defendants (MHB), it was only on or around 16 October 2008 that the plaintiffs (Promet) lodged a private caveat under presentation No 7836/2008 ('the caveat') on the lands, claiming that the lands had been unlawfully transferred to the defendants (MHB). The plaintiffs (Promet) contends that it has a

caveatable interest, having on 30 March 2007 decided to counterclaim against the defendants (MHB) and PPSB in the KL suit to seek the re-transfer of the lands to it.

[9] Upon discovery of the caveat, the defendants (MHB) promptly applied to remove the caveat pursuant to s 326 of the National Land Code ('NLC'). The Kedah Land and Mines Office duly issued a notice in Form 19C which the plaintiffs (Promet) received on 3 August 2009.

SECTION 326 OF THE NLC

[10] Under s 326 of the NLC, the defendants (MHB) as the registered proprietor of the lands bound by the caveat, is entitled to apply to the registrar for the removal of the caveat. Section 326 is reproduced below:

326 Removal of private caveats by Registrar.

(1) Any person or body whose land or interest is bound by a private caveat may at any time apply in Form 19H to the Registrar for its removal, and such application shall be accompanied by the prescribed fee.

(1A) On receiving any application for removal under this section, the Registrar shall —

(a) serve upon the person or body at whose instance the caveat was entered a notice of intended removal in Form 19C; and

(b) make an endorsement on the register document of title that the notice in Form 19C has been served on the person or body at whose instance the caveat was entered and of the date of such service, and shall sign and seal the endorsement.

(1B) In the case in which a notice of intended removal in Form 19C has been served under sub-section (1A), the caveat shall lapse and be of no effect at the expiry of t two months specified in the notice unless before the expiry of that period the Registrar shall have been served with an order of the Court extending the time provided in the said notice.

(2) The Court may, on the application of any person or body on whom such a notice has been served under sub-section (1A) (and acting, if the circumstances so require, ex parte), from time to time extend the said period of two months; and the Registrar, on being duly served with an order of the Court under this subsection, shall make an endorsement on the register document of the title of the date of service on him of the order and of the period of the extension, and shall sign and seal the endorsement.

(3) The Registrar shall remove any caveat pursuant to this section by cancelling the entry thereof on the register document of title, and noting thereon the reason for the cancellation and the date thereof.

(4) Every cancellation under sub-section (3) shall be signed and sealed.

[11] The test to be fulfilled by a caveator applying for an extension of his caveat under s 326 of the NLC is identical to that in an application for a removal of caveat under s 327 of the NLC. In *Rakyat Corp Sdn Bhd v Abd Naeeim bin Tarmiji* [2008] 4 MLJ 111 at p 119 whereby it was held:

> The burden on the caveator (in an application under s 327 of the NLC) is the same burden as imposed in an application for the extension of caveat under s 326 of the NLC.

[12] In a well established authority of the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, Gopal Sri Ram JCA (as he then was) at pp 728 and 729 explained that the test is a three stage test as follows:

> In my judgment, there are three stages through which an inquiry of this nature must go. *The first stage* is the examination of the grounds expressed in the application for the caveat. *If it appears that the grounds stated therein are insufficient in law to support a caveat, then cadit quaestio, and the caveat must be removed without* the necessity of going any further.
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> The matter does not come to an end once the caveator satisfies the court that his claim as expressed in the application in Form 19B amounts in law to a caveatable interest. *He must go on to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second stage*.
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> *The third stage* is arrived at only after the first two hurdles have been crossed by the caveator. *Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in Eng Mee Yong as 'the balance of convenience'*. As to the matters that go to determine in which direction the balance should tilt, these have already been set out in such clear terms by Lord Diplock in *Eng Mee Yong* that mere repetition becomes unnecessary. It is only upon satisfying these three stages of curial scrutiny that a caveat may be permitted to remain. That this should be so is only logical; *for it is a serious matter to caveat a person's property, and unless a case is properly made out, a caveat ought not be permitted to remain on the register a moment longer than is absolutely necessary*.

[13] Also in the case of *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782, the three stage were laid down in considering whether a caveat should remain on the register of document of title or be removed, a caveator must pass the three stage expressed as follows:

(a) whether he has disclosed a caveatable interest in his application under s 323(1) of the Code;

(b) if he has established a caveatable interest, then whether the evidence produced in support of this claim disclosed a serious question to be tried; and

(c) if both questions are resolved in the caveator's favour, then whether the balance of convenience or justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

[14] As such, in order for a caveat to be extended beyond its validity as provided in the NLC, the plaintiffs (Promet) must prove three things, namely:

(a) That the plaintiffs (Promet) has a caveatable interest;

(b) If the plaintiffs (Promet) has established that it has caveatable interest, then whether the evidence produced in support of its claim discloses a serious question to be tried; and

(c) If both questions above are resolved in the caveator's favour, then whether the balance of convenience or justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

THE PLAINTIFFS' (PROMET) CASE

[15] It is the plaintiffs' (Promet) submission that the registration of title of the lands to the defendants (MHB) is unlawful because of the alleged non-fulfillment of conditions precedent in the first and second SPAs. The plaintiffs' (Promet) submission on this issue is misconceived as the right to lodge a caveat must be minutely inquired into in order to decide whether the caveat should remain or be removed: see *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263; [1992] 1 CLJ 50. On the facts, it is evident that the first SPA did not terminate on 31 December 1998. For example, there is not a shred of evidence of the plaintiffs (Promet) seeking the return of the instruments of transfer for the lands.

[16] Further or in the alternative, even if the first SPA did terminate on 31 December 1998, the plaintiffs (Promet) had failed to show any evidence which can defeat the defendants' (MHB) registered title under s 340 of the NLC whereby the title of a registered owner is indefeasible save in the circumstances set out in s 340(2): see *Adorna Properties Sdn Bhd v Boonson Boonyanit* [2001] 1 MLJ 241.

[17] The plaintiffs (Promet) has also submitted that there is no evidence that the plaintiffs (Promet) and PPSB had consented to waive the conditions precedents of the first and second SPAS. The defendants (MHB) has no knowledge of the understandings reached between the plaintiffs (Promet) and PPSB under the first SPA. What the defendants (MHB) now knows is that time was of the essence of the first SPA, and that all indications point to the

plaintiffs (Promet) having waived the right to terminate the first SPA after the critical date 31 December 1998 passed, and at such, time ceases to be of the essence.

[18] As between the defendants (MHB) and PPSB, the plaintiffs (Promet) has no privity of contract and the issue can have no relevance to the plaintiffs' (Promet) claim to title because PPSB had title and the transfer to the defendants (MHB) was registered as long ago as 2002. The defendants (MHB) has not presented any memorandum of transfer in respect of land which has not been subdivided (HS(D) 623) and still subject to the condition of subdivision.

[19] Further, the defendants (MHB) is a bona fide purchaser for valuable consideration. 94% of the purchase price, or more than RM69m has been paid for the portion of land that have been subdivided and transferred to the defendants (MHB) by PPSB. The lands which are affected by the plaintiffs' (Promet) caveat are the lands that have already been subdivided and paid for by the defendants (MHB) under the second SPA.

[20] The plaintiffs (Promet) also contends that the legal interest of the lands has remained with the plaintiffs (Promet) due to the alleged termination of the first SPA based on *Kumpulan Sua Betong*'s case. The case of *Kumpulan Sua Betong* may be distinguished on its facts.

(a) In *Kumpulan Sua Betong* the cause for the possible invalidation of registration of title was alleged non-compliance with s 214A of the NLC which required the Estate Land Board's approval for transfer. Although it was also a condition precedent, the court considered only the statutory and penal aspect of non-compliance with s 214A of the NLC and the possible effect of that on the transaction.

(b) Insofar as the case hold that was premature to invoke s 340 of the NLC, the case was decided before *Adorna Properties Sdn Bhd* which has made it clear that even transfers on voidable instruments are protected by s 340 of the NLC. Furthermore, unlike the present case, where the relevant facts are undisputed, there were disputes of facts in that case, whether the land in question was a part of and contiguous to the rest of the estate land.

[21] As such, the case of *Kumpulan Sua Betong* has no application to the facts herein. As it stands, the defendants (MHB) is the legal owner of the lands with an indefeasible title.

[22] The plaintiffs (Promet) further submits that the fact that the defendants (MHB) had not applied to strike out the counterclaim in the KL

suit is evidence that there are serious issues to be tried in the counterclaim. This submission is also misconceived as the defendants' (MHB) defence to the counterclaim was filed without prejudice to the right to strike out the counterclaim struck out at any time, and together with the trial of the claim. It does not suggest a concession by the defendants (MHB) that there are serious issues to be tried in the counterclaim.

THE DEFENDANT'S SUBMISSION

[23] Learned counsel for the defendants (MHB) submitted that the plaintiffs (Promet) has failed to establish the threshold requirement of a caveatable interest in this case, and there is, therefore, no necessity for this court to consider the two subsequent tests for the removal of a private caveat. For the purposes of this proceedings, the plaintiffs' (Promet) arguments are completely unsustainable and misconceived for reasons set out below.

SECTION 323 OF THE NLC

[24] Under s 323(1) of the NLC, only specific classes of people are entitled to enter private caveat over land. Section 323(1) provides as follows:

> 323 Application for entry of private caveats
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> (1) The persons and bodies at whose instance a private caveat may be entered are –
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> (a) Any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest;
>
> (b) Any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
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> (c) The guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

[25] Gopal Sri Ram JCA in the Court of Appeal case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 at p 755 had paraphrased s 323(1) as follows:

> To paraphrase s 323(1) of the Code, a private caveat may be entered at the instance of any person or body who claims either:
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> (1) the title to land; or
>
> (2) any registrable interest in land.
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> The parameters of caveatability under s 323(1)(a) are therefore circumscribed by these words: 'title' and 'registrable interest'. It is only one makes a claim to either of these in land may enter a private caveat.

[26] It is trite law that under the NLC, the registered proprietor of any land obtains an indefeasible title. This is found in s 340(1) of the NLC which provides as follows:

> 340 Registration to confer indefeasible title or interest.
>
> The title or interest of any person or body for the time being registered as proprietor of any land ... shall, subject to the following provisions of this section, be indefeasible.

[27] The title of a registered proprietor shall only be defeasible in the specific circumstances provided in s 340(2), that is:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instruments; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[28] However, s 340(2) and s 340(3) of the NLC do not apply in the present case as there are no allegation of any fraud, misrepresentation or forgery against the defendants (MHB). The transfer of the lands was effected using valid registrable instruments duly executed by the plaintiffs (Promet). The lands were unconditionally transferred to the defendants (MHB) in good faith for valuable consideration.

[29] The doctrine of indefeasibility of title has been authoritatively determined by the Federal Court in *Adorna Properties Sdn Bhd*, where the court held ay p 245 as follows:

> Subsection (1) of the 340 of the NLC is worded in plain language. It say that the 'title or interest of any person for the time being registered as proprietor of any land ... shall be indefeasible, subject to the provision in the section ... so long as his name is on the land register, his title or interest is indefeasible unless caught by subsections (2) and (3).

[30] Based on the aforesaid, the purported termination of the first SPA has no relevance to the defendants' (MHB) rights as a registered proprietor. Even if the rights to title of PPSB were defeasible as a result of the alleged termination of the first SPA, the defendants (MHB) as a subsequent bona fide purchaser for value would be granted protection under the NLC by the proviso in s 340(3) which states:

Nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration ....

[31] In *Adorna Properties Sdn Bhd*, it was said at pp 241 and 246 as follows:

By virtue of the proviso to sub-s (3) of s 340 of the NLC, any purchaser in good faith and for valuable consideration are excluded from the application of the substantive provision of sub-s (3). For this category of registered proprietors, they obtained immediate indefeasible title to the lands. Therefore, on the facts of this case, even if the instrument of transfer was forged, the respondent nevertheless obtained an indefeasible title to the land (see p 246B–D).

[32] Following the doctrine stare decisis, the plaintiffs (Promet) is not a person or body which can ever successfully claim title to, or any registrable interest in the lands from the defendants (MHB), justifying the entry of a caveat. This was clearly demonstrated in the case of *Urethane Systems Sdn Bhd v Quek Yak Kang* [2006] 6 CLJ 81 at pp 86–87 whereby the court dismissed the caveator's application for extension of the caveat:

... the defendant had since 16 March 2005 *become the registered proprietor of the said land free from encumbrances. His title to and interest in the said land are now indefeasible under s 340(1) of the Code, and there is totally no evidence to defeat his registered title under s 340(2) of the Code* ... For the reasons adumbrated above the plaintiff's application is hereby dismissed with costs, and that the plaintiff do pay the defendant damages for the wrongful entry of the caveat.

[33] Further, in *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113; [1984] 1 CLJ 441 (Rep) the court held at p 116 (MLJ); p 445 (CLJ):

Thus it is plain that the appellant *claims to have the right to lodge the caveat* but based on cl 4(a) of the deed of assignment... but this alone cannot create a caveatable interest in the land. *The contractual provision does not create an interest within the meaning of s 323 of the National Land Code. Interests which are protectable by caveat are only interests recognised by the Code*. The contractual provision does not amount to an equitable or other interest sufficient to support a caveat. Section 323(1) of the National Land Code sets out the classes of persons who may lodge private caveat. They are persons or body claiming title to any alienated land; or claiming any right to such title or interest; and includes persons or body claiming to be beneficially entitled under any trust affecting any such land or interest. *The words 'any right to such title or interest' may be wide enough to allow rights arising under a contract for registrable dealing to be protected by a caveat but they are not wide enough to cover mere personal rights as distinguished from rights relating to land.*

[34] To further emphasise the point, in *DCB Finance Berhad v Hii Yiik Ting* [1996] MLJU 591; [1996] 1 LNS 12, the court held that a registered interest will always prevail over a caveat. At pp 13–14 (MLJU); p 7 (LNS) it was said:

> There is no evidence of any fraud by the plaintiff. So I am of the view that *the interest of the plaintiff as a registered charge is indefeasible* ... as the charge was registered earlier in time ie on 9 July 1992 whereas the caveat was lodged on 13 August 1994 ie about 17 months after the registration of the charge, *the interest of the plaintiff prevails over that of the defendant* ...
>
> There is nothing this court can do except to sympathise with the predicament faced by the defendant. *Perhaps the remedy available would be for the defendant to sue the vendor (Robin Siaw) for damages for breach of contract.*
>
> In the circumstances and for the reasons given. I hold that as between the plaintiff and the defendant there are no serious questions to be tried. No balance of convenience has been shown. The registered charge of the plaintiff ranked in priority over the caveat lodged by the defendant. *The plaintiff as the registered chargee has an indefeasible title to the land. As such the plaintiff is entitled to have the said caveat removed and so I order*.

[35] Therefore, the plaintiffs' (Promet) rights, if any, was only amount to a contractual right against PPSB based on the first SPA. The defendants (MHB) is not party or privy to the first SPA and neither does the plaintiffs (Promet) have any privity of contract with the defendants (MHB). Thus, as determined in *Yuny-Li Home Care Sdn Bhd v Fairview Development Sdn Bhd* [2009] 9 MLJ 189; [2009] 1 LNS 543 at pp 197–198 (MLJ); para 14 (LNS), the court said:

> The defendant's claim, which has to raise a serious question to be tried, must relate to an interest in the said land .... Here Fairview will have to establish to an interest in the land. *If terminate the agreement, you are interested in damages and your interest is not caveatable*.

[36] Accordingly the plaintiffs (Promet) does not have a caveatable interest within the meaning of s 323 of the NLC. At the risk of repetition, the plaintiffs (Promet) has failed to establish that it has caveatable interest in the lands to justify the lodgment of the caveat.

[37] As there is no lawful basis under which the good titles obtained by the defendants (MHB) from PPSB in respect of the lands can be rendered defeasible, there is accordingly, no issue to be tried. Thus, there is no necessity for this court to consider the matter further.

PREJUDICE AND DAMAGES TO THE DEFENDANTS (MHB)

[38] Now, it is not disputed that the defendants (MHB) has been in possession and occupation of the lands since 1997 with the full knowledge and consent of the plaintiffs (Promet). The defendants (MHB) has invested more than RM200m to construct and develop the Four Seasons Resorts Langkawi (a six-star holiday resort) on the lands, which has been in operation since around April 2005.

[39] As such, the existence of the caveat over the lands is prejudicial to the defendants (MHB) as the caveat affects the value of the lands and thereby, the rights and interests of the shareholders of the defendants (MHB). Further, it diminishes investor confidence in the defendants (MHB) and that is a loss which is unquantifiable.

[40] The prejudice to the defendants (MHB) is further compounded by the facts that the plaintiffs (Promet) had acted with inordinate delay in prosecuting its alleged rights. The plaintiffs (Promet) had stood by while titles were registered way back in 2002. This factor smacks bad faith on the part of the plaintiffs (Promet). The plaintiffs (Promet) had failed to provide any explanation for the delay in lodging the caveat and filing a counterclaim, and that too only when the defendants (MHB) had filed the KL suit for specific performance. In the case *Megapillars Sdn Bhd v Loke Kwok Four* [1996] 3 MLJ 71; [1996] 4 CLJ 82, the court held at pp 83–84 (MLJ); p 93 (CLJ) as follows:

> The object of a caveat like that if an interlocutory injunction is to provide interim protection to the interest of the applicant who can show that he has a genuine claim on that interest, and that the status quo between the parties should be maintained pending the final disposal of his claim at a later date. *It follows therefore, that the applicant must pursue his claim timeously in the court and failure to do so will defeat the privilege of having his caveat being applied against the inalienable right of the registered proprietor to enjoy his land. Thus, where there has been an inordinate delay on the part of the caveator to prosecute his claim against the caveatee, the court will not lend its assistance to allow him to maintain this caveat to the detriment of the registered proprietor as to prevent a man dealing with his property after such a long delay is so in inequitable*.

[41] As to the plaintiffs' (Promet) contention that the defendants (MHB) has no plan to dispose of the lands is in itself cannot be a ground for the extension of the validity of the caveat. The fact that the defendants (MHB) has no plan at the present to dispose of the lands does not mean that the defendants (MHB) will not want to dispose of it if the right opportunity arises, or deal with the lands in ways other than which involves a disposition.

A **[42]** The lands are now encumbered by a caveat and all that legal implications of that follow, including the inability to charge, subdivide, or amalgamate the lands. This is a prejudice to the defendants (MHB) that should tilt the balance of convenience against the extension of the caveat.

B COMPENSATION

[43] As regard compensation, s 329 of the NLC provides:

C > Any person or body who wrongfully, or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damages or loss ...

D **[44]** By reasons of the matters aforesaid, the plaintiffs' originating summons is hereby dismissed, the caveat vide presentation No 7836/2008 is ordered to be removed forthwith. The defendants (MHB) is at liberty to file on application for compensation to be assessed for wrongful lodgment of the caveat.

E *Plaintiff's originating summons dismissed.*

Reported by Kohila Nesan

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